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No. 232

In the Supreme Court of the United States

OCTOBER TERM, 1958

FRANK H. HILLS, ET AL., PETITIONERS

v.

COLONEL EISENHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
B. JENKINS MIDDLETON,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the district court (R. 51–61) is reported at 156 F. Supp. 902. The opinion of the court of appeals (Pet. 17–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1958 (Pet. 24). The petition for a writ of certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an elimination of civilian positions to reduce expenditures violates the civil service statutes.

2. Whether an alleged failure of military officers to comply with the instructions of their superiors in reassigning civilian employees to reduce payroll expenditures gives rise to a private cause of action in the employees affected.

3. Whether reassigned civilian employees whose former jobs are to be performed by military personnel in alleged violation of Defense Department economy instructions may sue to enjoin the action of the local administrative officers before protesting the action through the normal chain of command.

STATUTES INVOLVED

The pertinent provisions of Title 5 of the United States Code are printed in the Appendix, *infra*, pp. 9–11.

STATEMENT

Petitioners are civilian employees of the Department of the Air Force holding positions as "foremen" at Travis Air Force Base, California (R. 42). Respondents are command and administrative officers at the base (R. 45). In August 1957 the Secretary of Defense directed each military department to reduce its total civilian payroll by 5 percent (R. 42). The order included the following instruction (R. 43):

> In accordance with past procedures, reduction in civilian personnel levels will be achieved without replacement by military personnel or substitution by contract operation. It is recognized that, in exceptional cases, temporary adjustments in the assignment of military and civilian personnel may be required as a matter of operational necessity. Such expedients,

> however, will be replaced by permanent arrangements which comply with the foregoing instructions at the earliest practicable date.

Petitioners were thereafter notified that, effective October 27, 1957, their "foremen" positions were being eliminated and they were being reassigned as "assistant foremen" (R. 44). Petitioners protested the proposed action to the Regional Director of the Twelfth United States Civil Service Region, who replied as follows (R. 21):

> * * * [Y]ou are advised that the agency's determination to run a reduction in force in any particular kind of work is not appealable to the U. S. Civil Service Commission under the retention preference regulations. An agency determination to effect a reduction in civilian personnel and to assign military personnel to carry on the duties formerly performed by civilian personnel is a problem outside our jurisdiction and is not the basis upon which we could accept a reduction-in-force appeal.
>
> * * * if you feel that the regulations were not properly applied in your case, you may appeal to this office within seven (7) days from the date of receipt of this letter by informing us specifically and in detail of the exact nature of the violations of the retention preference regulations.
>
> Regarding the nature of the complaint in your recent letter, we can only suggest that this matter be presented to Headquarters, U. S. Air Force, Washington, D. C., through the Commanding Officer, Travis Air Force Base, California.

Without seeking further administrative action, petitioners instituted this action to enjoin respondents from "discharging" them and for declaratory relief. The complaint alleged that the petitioners were being replaced by military personnel in furtherance of an alleged plan to replace top civilian supervisory personnel with military personnel, in "direct violation of the instructions of the Secretary of Defense * * * and * * * of plaintiffs' rights under Title 5 U. S. C. A. Sections 652 et seq." (R. 43–44). More specifically, petitioners asserted that their threatened "discharge" was "in violation of their rights under" 5 U. S. C. 652 and 861 (R. 41).

On respondents' motion, the district court dismissed the complaint for lack of jurisdiction (R. 51–62). The court held that petitioners' claim of a federal right which had been violated was so frivolous and insubstantial that there was no basis for federal jurisdiction (R. 54–55), and that in any event the petitioners had failed to exhaust their administrative remedies (R. 61). The court of appeals, Judge Pope dissenting, affirmed on the ground of failure to exhaust administrative remedies (Pet. 17–23).[1]

ARGUMENT

1. As part of a "reduction in force" required by a 5% reduction in the funds available to the Air

[1] Neither court below found it necessary to reach the Government's further contentions, equally dispositive of the case, that, since the injunction sought would require the Government to pay for petitioners' services, the action was an unconsented suit against the United States; that there was an adequate remedy at law (a suit for back pay); and that the Secretary of Defense was an indispensable party.

Force for its civilian payroll, the positions occupied by petitioners were eliminated and they were reassigned to lower-grade jobs. Petitioners concede that their seniority and veterans' preference rights were fully protected in the reassignments. They claim, however, that their positions were wrongfully eliminated. The contention is patently frivolous and the district court properly dismissed the action for lack of substance to the claim.[2]

The civil service statutes cited by petitioners, 5 U. S. C. 652, 861, and 863, are irrelevant to their contention. Sections 652 and 863 provide procedural safeguards in dismissals or demotions for cause (misconduct, inefficiency, etc.) and Section 861 protects seniority rights in the order of lay-off upon a reduction in force. They have no application to determinations of the number or kind of positions to be made available for civilian personnel. Such matters were necessarily left to the discretion of the responsible officials in determining the needs of the agency.

By denying the existence of a remedy under the civil service statutes, the petitioners substantially admit their inapplicability to the facts of this case. Nor do they seriously contend that there is any statute inhibiting the military departments from replacing, in any given position, civilian personnel with military. Their real complaint is simply that, in implementing the reduction in force, the military officers

[2] Arguably the dismissal on this ground should have been on the merits—failure to state a claim—rather than for lack of jurisdiction, but only the Government could be prejudiced by that error.

of the base have not complied with the instructions of their superiors. The order directing the reduction in force stated the general policy that, as in the past, the "reduction in civilian personnel levels will be achieved without replacement by military personnel or substitution by contract operation" (R. 43). Petitioners claim that respondents are planning to use military personnel in the positions from which they are being demoted, that such action will violate the above instruction, and that the respondents should therefore be enjoined from demoting them.

Clearly such allegations do not support a private right of action in petitioners. In the first place, the purpose of the order was not to protect petitioners but to assure that savings in one pocket would not be offset by added expenditures from another, a matter of no concern to petitioners. More fundamentally, the order was simply an instruction to respondents from their military superiors, and it is only to those superiors that respondents are accountable for compliance with it. For if the superiors approve of the action taken, then *ipso facto* there is no violation of instructions of which petitioners can complain. That is, the action proposed is fully subject either to revision or ratification by the respondents' superiors, and by hypothesis petitioners could not object to any action taken by them. An injunction against the proposed action solely on the ground of the respondents' alleged failure to comply with their superiors' instructions would thus deprive the superiors of their admitted right to order such action themselves. In short, questions whether a superior's instructions have

been properly implemented and, if not, what corrective measures should be taken are the exclusive concern of the military command and afford no basis for judicial intervention.

2. It is also clear that, as held by the court of appeals and alternatively by the district court, petitioners have failed to exhaust their administrative remedies. See, *e. g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The difficulty experienced by the courts below in defining those remedies is due only to the difficulty of determining what rights petitioners are asserting. For any rights asserted under the civil service statutes, 5 U. S. C. 652, 861, and 863, petitioners undeniably have a right of appeal to the Civil Service Commission. (See 5 C. F. R. § 20.9 (1957 Supp.). Their claim that they have no such remedy is no more than an admission that their rights under those sections have not been violated—which of course they have not been. If, on the other hand, as appears to be the case, their only complaint is that the base officers did not comply with the instructions of their superiors, their remedy is to protest the action through the appropriate chain of command and ultimately to the Secretary of the Air Force.[4]

[3] Air Force Manual 40-1, c. AF E2-2, § 2, set forth at R. 22-23, provides procedures for processing civilian employee grievances, with the final determination being made by the Secretary of the Air Force.

[4] Candor compels the admission, though outside the record, that petitioners, or some of them, did indeed protest to the Secretary of the Air Force, both directly and through their Congressman. It is understood that the investigation of the matter has been suspended pending the outcome of this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
B. JENKINS MIDDLETON,
Attorneys.

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APPENDIX

The pertinent provisions of Title 5 of the United States Code are as follows:

§ 652 (a). No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects. [37 Stat. 555, as amended.]

* * * * * *

§ 861. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which

shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. [58 Stat. 390.]

* * * * *

§ 863. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (ex-

cept where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preferenee eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. [58 Stat. 390, as amended.]

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